Supreme Court, U. S.
FILED
MAR 10 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1258

PETER TERRITO, JOHN CHANTREY, EDWARD A. BLANCHARD, AL BOSSIER, EDWIN HARTZMAN and HENRY R. CARTER,

Appellants

versus

CURTIS POCHE, JR. and VELMA POCHE, widow of Curtis Poche, Sr., Individually and as Administratrix of her Minor Children, Whitney Poche and Patricia Poche,

Appellees

ON APPEAL FROM THE SUPREME COURT STATE OF LOUISIANA

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO.

PETER TERRITO, JOHN CHANTREY, EDWARD A. BLANCHARD, AL BOSSIER EDWIN HARTZMANN and HENRY R. CARTER,
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CURTIS POCHE, JR. and VELMA POCHE, widow of Curtis Poche, Sr., Individually and as Administratrix of her Minor Children, Whitney Poche and Patricia Poche,
Appellees

ON APPEAL FROM THE SUPREME COURT, STATE OF LOUISIANA

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Supreme Court, State of Louisiana, dated December 10, 1977, reversing the Court of Appeal, Fourth Circuit, State of Louisiana.

THE OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is reported at 339 So.2d 1212 (La. 1976), *rehearing denied* December 10, 1976. The opinion of the Court of Appeal is reported at 329 So. 2d (La. App. 4th Cir. 1976).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to both 28 U.S.C. §§ 1257(1) and 1257(2), this being an appeal which draws into question the validity of and the conflict between 33 U.S.C. § 933(i) (a provision of the Longshoremen's and Harbor Workers' Compensation Act) and Louisiana Revised Statute 23:1101 as interpreted by the Louisiana courts beginning with *Kimbro vs. Holladay*, 154 So.2d 369 (La. App. 2nd Cir. 1934) and continuing through *Canter vs. Koehring Co.* 283 So. 2d 716 (La. 1973). A Notice of Appeal was filed in the Supreme Court, State of Louisiana on January 10, 1977, together with a Request to Certify and Transmit the Entire Record. The constitutionality of 33 USC § 933(i) and La. Rev. Stat. 23:1101 was brought into issue and the decision of the Supreme Court of Louisiana favored the Louisiana Statute. Likewise the conflict between the federal and state statute was brought into question under the "Supremacy Clause" of the United States Constitution, Article VI, Clause 2. The Supreme Court of Louisiana a) acknowledged the statutory conflict but refused to examine that conflict; or b) declined to hold that the federal statute preempted or superceded the operation of the conflicting provision of state law. The result is a holding that state law supercedes federal law, that the state statute is not in fatal conflict with the federal statute under the Supremacy Clause, or that 33 USC § 933(i) is unconstitutional.

In the event that the Court does not consider appeal to be the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 USC §2103.

QUESTIONS PRESENTED

Whether Louisiana Revised Statute 23:1101 as interpreted by the Louisiana supreme and appellate courts conflicts with Section 933(i) of the Longshoremen's and Harbor Workers' Compensation Act so as to result in a finding that the operation of the state statute is repugnant to the federal Act promulgated pursuant to the United States Constitution.

STATEMENT OF THE CASE

Curtis Poche, Sr. was killed in the course and scope of his employment with Avondale Shipyards, Inc., Jefferson Parish, Louisiana. Appellees filed a survival and wrongful death suit in the 24th Judicial District Court, State of Louisiana, against Avondale Shipyards, Inc. and the named individual defendants (appellants) alleging general negligence counts against appellants as executive officers and fellow employees of the decedent. An Exception of No Cause of Action (a state procedure similar to a Rule 12b Motion to Dismiss for Failure to State a Claim, Federal Rules of Civil Procedure) was filed by appellants and prior to oral argument all counsel stipulated as follows:

A. Decedent was an employee of Avondale Shipyards, Inc. within the definition of "employee" found in the Longshoremen's and Harbor Workers' Compensation Act, 33 USC §902(4).

B. Avondale Shipyards, Inc. is an employer within the definition of "employer" under the Act. 33 USC §902(4).

C. Decedent was killed in an adjoining area customarily used by an employer in building a vessel.
33 USC §903(a).

The District Court maintained the Exception after oral argument and denied plaintiffs' Motion for New Trial for Reargument Only. The Court of Appeal affirmed on the basis of a conflict between 33 USC §933(i) and La. Rev. Stat. 23:1101 and held that the immunity granted to fellow employees and officers by the federal statute must prevail. The Supreme Court of Louisiana reversed in an opinion dated November 8, 1976, holding either that the conflict between the statutes did not exist or that the conflict did not render the state statute invalid or that the conflict between the statutes should not have been examined. Application for re-hearing was timely filed and denied on December 10, 1976.

The federal questions were raised in the District Court, in the Court of Appeal through Assignments of Error and in appellants' brief to the Supreme Court of Louisiana.

This case brings into question the validity of a state statute permitting tort suits against fellow employees in the face of a conflicting provision of a federal law specifically immunizing these same fellow employees. The applicable section of the respective statutes follow:

33 USC §933(i) provides:

> The right to compensate or benefits under this chapter shall be the exclusive remedy to an em-

> ployee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, that this provision shall not affect the liability of a person other than an officer or *employee of the employer.*

La. Rev. Stat. 23:1101 provides:

> When an injury for which compensation is payable under this Chapter has been sustained under circumstances creating in some person (in this Section referred to as third persons) other than the employer a legal liability to pay damages in respect thereto, the injured employee or his dependent may claim compensation under this Chapter and the payment or award of compensation hereunder shall not affect the claim or right of action of the injured employee or his dependent against such third person, nor be regarded as establishing a measure of damages for the injury; and such injured employee or his dependent may obtain damages from or proceed at law against such third person to recover damages for the injury.

Fellow employees and executive officers have been included by Louisiana courts in the category of the "third persons" referred to above. *Kimbro vs. Holladay*, 154 So. 369 (La. App. 2nd Cir. 1934) and subsequent decisions.

The Louisiana law as interpreted by the Louisiana state courts clearly permit so called "executive officer" tort suits; likewise, the federal statute prohibits same by conferr-

ing an immunity from suit upon decedent's fellow employees and executive officers. The parties stipulated that Curtis Poche was an employee who came under the provision of the Longshoremen's Act, as amended. Similarly, there exists no question that the individual defendants (appellants) were fellow employees of Curtis Poche. The Louisiana Supreme Court was confronted with the conflict at issue between the federal and state law as reviewed by the lower courts. The majority opinion of the highest Louisiana court is ambiguous in many respects but the court did recognize the conflict inherent in the statutes, 339 So. 2d 1212, 1221, but refused to recognize federal preemption or supremacy, 339 So. 2d at 1221. The result is a denial of the immunity granted to appellants by the federal Act, a result tantamount to a striking down of 33 USC § 933(i) in the face of the Louisiana statutory - jurisprudential tort remedy.

The federal question is substantial under the decisions of the Court construing conflicts between federal and state law, *Perez vs. Campbell*, 402 US, 637 (1971), *Hines vs. Davidowitz*, 312 US 52 (1941), and *Florida Lime and Avocado Growers, Inc. vs. Paul*, 373 US, 132 (1962), and decision concerning federal preemption in an area of state interest. *Bethlehem Steel Co. vs. New York State Labor Relation Board*, 330 US 767 (1947). Finally, when a final decision of a state court has sustained validity of a state statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter of right. *Huffman vs. Pursue, Ltd.*, 95 S.Ct. 1200 (1975).

Appellants suggest that a full and complete exposition of the issue is required for adequate resolution of the problem involving a sensitive issue of federal - state relationships

under the Longshoremen's Act as amended. The decision will affect the rights of every longshore and shipbuilding employee in the State of Louisiana and appellants submit that the controversy merits plenary consideration.

CONCLUSION

For The Foregoing Reasons, Probable Jurisdiction Should Be Noted.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I certify that three copies of the Jurisdictional Statement was served upon all counsel of record by depositing same in a United States mail box, first class postage prepaid, addressed to counsel of record at their post office addresses. March 9th, 1977.

DONALD A. HAMMETT

APPENDIX A

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT OF LOUISIANA

NO. 57,966

AVONDALE SHIPYARDS, INC., PETER TERRITO, JOHN CHANTREY, EDWARD A. BLANCHARD, AL BOSSIER, EDWIN HORTZMAN and HENRY C. CARTER

Appellants

VS.

CURTIS POCHE, JR. and VELMA POCHE, WIDOW OF CURTIS POCHE, SR., INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATES OF HER MINOR CHILDREN, WHITNEY POCHE AND PATRICIA POCHE

Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed Jan 10, 1977

Notice is hereby given that Peter Territo, John Chantrey, Edward A. Blanchard, Al Bossier, Edwin Hortzman and Henry C. Carter, appellants named above, hereby appeal to the Supreme Court of the United States from the final judgment of this court reversing the Court of Appeal, Fourth Circuit, State of Louisiana entered in this action on

December 10, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257 (1) and 1257 (2).

Alternatively, appellants submit this appeal be regarded as a petition for writ of certiorari under 28 U.S.C. § 2103.

s/ Donald A. Hammett
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CERTIFICATE OF SERVICE

I certify that a copy of the Notice of Appeal was served upon all counsel of record by depositing same in a United States mail box, first class postage prepaid, addressed to counsel of record at their post office addresses.

s/ Donald A. Hammett

APPENDIX B

WRIT OF REVIEW TO THE COURT OF APPEAL, FOURTH CIRCUIT PARISH OF ORLEANS, STATE OF LOUISIANA

SUPREME COURT OF LOUISIANA

NO. 57,966

CURTIS POCHE, JR. AND VELMA POCHE, WIDOW OF CURTIS POCHE, SR., INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATES OF HER MINOR CHILDREN, WHITNEY POCHE AND PATRICIA POCHE

V.

AVONDALE SHIPYARDS, INC., PETER TERRITO, JOHN CHANTREY, EDWARD A. BLANCHARD, AL BOSSIER, EDWIN HORTZMAN AND HENRY C. CARTER

CONSOLIDATED WITH

NO. 57,906

ALDRICH ADAMS

V.

ED HARTZMAN, ET AL.

Filed Nov 8 1976

WRIT OF REVIEW TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS STATE OF LOUISIANA

MARCUS, Justice

This case involves two independent suits consolidated for our consideration because they present a common issue. In one suit, the widow and children of Curtis Poche, Sr. filed a third party negligence action against Avondale Shipyards, Inc., Poche's employer, and certain named executive officers of Avondale Shipyards, Inc. pursuant to La. R.S. 23:1101 for the wrongful death of their husband and father, respectively. On August 17, 1973, Curtis Poche, Sr., in the course and scope of his employment by Avondale Shipyards, Inc., was engaged in new ship construction in a shipyard area located entirely over land when the section of the ship to which his scaffold was attached suddenly broke away from the rest of the structure and collapsed, causing him to fall and be fatally injured.

The plaintiff in the second suit, Aldrich Adams, sustained personal injuries in the course and scope of his employment by Avondale Shipyards, Inc. on October 28, 1974, while he was working entirely over land as operator of a crane being used in new ship construction. He was struck on the head and neck by a piece of ship framework which swung around unexpectedly as it was being moved by the crane. Plaintiff made several executive officers and fellow employees defendants in a negligence action filed pursuant to La. R.S. 23:1101.

Defendant executive officers and fellow employees in both suits filed exceptions alleging no right or cause of

action claiming that the benefits afforded by the Longshoremen's and Harborworker's Compensation Act (LHCA) were available to plaintiffs and thus excluded all rights, remedies and benefits otherwise provided by the Louisiana Workmen's Compensation Act. Avondale Shipyards, Inc. also filed an exception of no cause of action to the suit instituted by Curtis Poche, Jr., et al. From judgments maintaining defendants' exceptions and dismissing their suits, plaintiffs appealed to the Fourth Circuit where their cases were consolidated for consideration. The appeal court affirmed the judgments below,[1] holding that, although the LHCA and Louisiana compensation acts may operate concurrently as to injuries occurring on land, a plaintiff who elects to sue under state law may not recover against executive officers and fellow servants since recovery against same would conflict with the prohibition of such suits embodied in the federal act.

The appeal court additionally affirmed the trial court's judgment sustaining the exception filed by Avondale Shipyards, Inc. and dismissing Avondale from the *Poche* suit. We granted writs of certiorari to consider the correctness of the judgments of the court of appeal.[2]

The issues presented for our consideration are narrow yet difficult ones involving the delicate balance to be maintained between state and federal laws which purport to

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1. Poche v. Avondale Shipyards, Inc., 329 So. 2d 211 (La. App. 4th Cir. 1976); Adams v. Hartzman, 329 So. 2d 218 (La. App. 4th Cir. 1976).

2. 322 So. 2d 280.

govern the same area of activity. We must decide (1) whether a worker injured on land and covered by the LHCA[3] may elect to pursue the remedies afforded under the workmen's compensation law of Louisiana, and (2) if so, whether the state compensation law is to be applied in its entirety or only insofar as its provisions are compatible with those embodied in the federal legislation.

Prior to the enactment of the 1972 amendments to the LHCA, the coverage of the act was defined as follows:

. . . .

> (3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
>
> (4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.) 33 U.S.C. §902.
>
> (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and *if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . .* 33 U.S.C. §903. (Emphasis added.)

3. All parties stipulated that both injured workers were within the coverage of LHCA as amended.

It is undisputed that the LHCA before 1972 had no application to injuries occurring on land; state compensation acts constituted the sole remedy available, even to traditionally maritime workers who happened to be injured on shore. Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969). The principle that local not maritime law governed workers injured on land was reiterated in Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971). At the same time, however, the United States Supreme Court intimated that under the authority granted in Articles I and III of the United States Constitution, Congress might legislate compensation coverage for maritime workers injured in shoreside accidents.[4]

Congress apparently responded to the invitation in *Nacirema* and revised the coverage of the LHCA in 1972 to extend benefits to certain classes of maritime workers who performed their duties on land. The coverage provisions were expanded as follows:

4. Our attention has been directed to the recent case of Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976) decided by the United States Court of Appeals for the Fifth Circuit holding that the 1972 amendments to LHCA were a constitutional extension of the admiralty jurisdiction by Congress. The court further notes that, because of the disposition of this issue, it need not reach the question of whether the 1972 amendments were an exercise of Congress' power under the commerce clause as well. We do not consider this holding conflicts with our conclusions that there is no constitutional impediment to the concurrent operation of the LHCA and Louisiana Workmen's Compensation Act with respect to injuries sustained on land in the course of new ship construction and that the 1972 amendments do not preempt the state law in this field under the facts and circum stances herein expressed.

(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). 33 U.S.C. § 902.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . .33 U.S.C. § 903(a).

Defendants argue that the 1972 amendments to the LHCA have the effect of preempting the power of this state to provide a compensation remedy to maritime workers injured on

our soil. Their principal contentions are: (1) that the need for uniformity in the field of admiralty law demands that federal law operate exclusively as to covered workers; (2) that the history and wording of the LHCA evidence a Congressional intent that federal law in this area be preeminent; and (3) that even if concurrent operation of the two compensation laws is permissible, state law must yield where its provisions conflict with those of the federal act.

We do not agree with any of these contentions.

THE EXTENSION OF LHCA INLAND

The history of workmen's compensation as it relates to longshoremen, harborworkers, and others injured on navigable waters in the course of their employment has been a long and tortuous one. In 1917, the United States Supreme Court held, in a divided opinion, that a state compensation law could not constitutionally be applied to a longshoreman who was killed aboard a ship in navigable waters while engaged in unloading cargo. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). The Court emphasized that under the facts of the case, the matter was clearly within traditional admiralty jurisdiction and therefore not subject to the diverse legislation of the various states. The Court noted however that, while "it is difficult, if not impossible to define with exactness just how far the general maritime law may be modified or affected by state legislation, that this may be done to some extent cannot be denied. . . ." The rule was announced that state legislation would be permissible unless "it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its internation-

al and interstate relations." In 1917, a majority of the Court felt that this rule was violated when a state provided workmen's compensation to a stevedore injured on navigable waters. It is noteworthy, however, that the *Jensen* Court did not suggest that the uniformity of the maritime law was jeopardized when state compensation laws were applied to the same workers injured on shore, doubtless because at that time admiralty jurisdiction in tort was largely tied to the situs of the injury on navigable waters. That state law could constitutionally apply to longshoremen injured on land was confirmed in State Industrial Commission v. Nordenholt Corp., 259 U.S. 263 (1922).

Thereafter, in Grant Smith-Porter Shipping Co. v. Rhode, 257 U.S. 469 (1922), the Supreme Court crossed its own line of demarcation between state and federal jurisdiction and held that, if the nature of an employee's work was of "local concern," a state compensation act could apply without working a material prejudice to the federal maritime law, even if the injury occurred on navigable water.

In 1927, Congress passed the Longshoremen's and Harborworker's Compensation Act, 33 U.S.C. § 901 *et. seq.*, which provided a federal compensation remedy for workers injured on navigable waters *"if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."* 33 U.S.C. § 903(a). This language of the act appeared to make the state and federal compensation remedies exclusive and engendered much confusion over which cases involved interests that were "maritime but local" and thus cognizable under state as opposed to federal law.

In Davis v. Department of Labor & Industries, 317 U.S.

249 (1942), the Supreme Court coined the phrase "twilight zone" to describe the shadowy area in which it was difficult to determine whether state or federal law should apply. In this area, if a worker elected to apply for state benefits his choice would be upheld and the application of state law presumed constitutional. In subsequent cases, the Court made it clear that an area of concurrent jurisdiction existed in workers injured on navigable waters,even when their occupations were traditionally maritime, could pursue remedies available under state compensation laws. Hahn v. Ross Island Sand & Gravel Co.,358 U.S. 272 (1959);Richard v. Lake Charles Stevedores,Inc.,95 So. 2d 830 (La. App. 1st Cir. 1957) cert.denied 355 U.S. 952 (1958); Baskin v. Industrial Accident Commission,338 U.S. 854 (1949);Bethelehem Steel Co. v. Moore,335 U.S. 874 (1948). Although dicta in the Supreme Court's decision in Pennsylvania Railroad Co. v. O'Rourke,344 U.S.334 (1953) referred to the LHCA as an exclusive remedy,the Court's comments were made in a case involving a contest between two federal compensation systems (FELA and LHCA). Moreover, in Calbeck v. Travelers Insurance Co.,370 U.S. 114 (1961),the Court judicially excised the troublesome clause in the LHCA "if recovery. .may not validly be provided by State law,"which had created the implication that state and federal compensation systems were exclusive.The Court held that LHCA benefits would be available for all workers injured on navigable

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5. Both the *Moore* and *Baskin* cases involved workers engaged in the repair of completed vessels over navigable waters. It had formerly been held that such injuries were within the exclusive federal maritime jurisdiction and thus beyond the protection of state compensation remedies. John Baizley Iron Works & Span, 281 U.S. 222 (1930). Nevertheless, the Supreme Court affirmed the state court's award of state benefits in *Moore* and reversed the denial of state benefits in *Baskin*, which denial had been based on the alleged exclusivity of the LHCA remedy.

waters, whether or not a particular injury might also have been within the constitutional reach of a state compensation act. In so ruling, the Court did not suggest that the availability of federal benefits thereby excluded the operation of state law, but rather stated that its decision was consistent with *Davis* and the twilight zone concept. We note particularly the discussion in *Calbeck* of the decision in Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366 (1953). In that case, the LHCA was held applicable to a fatal injury occurring on land to an employee engaged in the repair of a vessel which was physically located on a marine railway inasmuch as such a railway was comparable to a dry dock, an area specifically covered by LHCA. With regard to the LHCA coverage, the *Calbeck* Court noted that "at the same time, since the injury did, in a physical sense occur on land, there is little doubt that a state compensation act could validly have been applied to it."

In our own court, in Ellis v. Travelers Insurance Co., 241 La. 433, 129 So. 2d 729 (La. 1961), we were persuaded by a decision of the United States Court of Appeal for the Fifth Circuit that as to a longshoreman performing maritime work at the time of injury aboard a vessel afloat on navigable waters the LHCA was the exclusive remedy. Flowers v. Travelers Ins. Co., 258 F.2d 220 (5th Cir. 1958). Our decision in *Ellis*, however, and the *Flowers* decision, on which we heavily relied, was reached without the benefit of the Supreme Court's opinion in *Calbeck*. Subsequently, in Arp v. Maryland Casualty Company, 170 So. 2d 166 (La. App. 4th Cir. 1964), the Fourth Circuit held that at least as to a shore based repairman injured aboard a vessel, the state compensation system could apply. We denied writs

with the notation: 'On the facts found by the Court of Appeal, there appears no error of law in its judgment." 247 La. 411, 171 So. 2d 666 (1965).

What can be gleaned from an examination of these cases is that the United States Supreme Court has made it clear that state compensation laws can be constitutionally applied concurrently with the federal compensation system to some, if not all, categories of maritime workers. While the Court has never overruled *Jensen*, it has demonstrated that the uniformity of the federal maritime law is not materially prejudiced by the operation of state compensation remedies even in areas where the federal law is also applicable.[6] Now that the amendments to LHCA cover land-based workers traditionally falling under the exclusive coverage of state acts, we see little reason to conclude that the concurrent application of the two compensation systems is any more inimical to the maritime law than was the case before the 1972 amendments.

We are reinforced in our conclusions by the recent decision of the United States Supreme Court in Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973). In commenting on the shoreward extension of admiralty jurisdiction in the Admiralty Extension Act, 46 U.S.C. § 740, the Court noted:

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6. See discussions of concurrent jurisdiction in A. Larsen, The Conflict of Laws Problem Between the Longshoremen's Act and State Workmen's Compensation Acts, 45 So. Calif. L. Rev. 699 (1972).

> While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the framers, it hardly follows from the constitutionality of that extension, that we must sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the states. . . . Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law.

The Court further stated that *Jensen* has been confined to its facts, *viz.*, to suits relating to the relationships of vessels, plying the high seas and our navigable waters, and to their crews. The fact that a whole system of liabilities was established on the basis of the reasoning in that case, the Court noted, led years ago to the establishment of the twilight zone where state regulation was permissible. Thus, even subsequent to the passage of the 1972 amendments to the LHCA, the Court seems to have reaffirmed the notion that state and federal compensation systems can co-exist, at least in cases with facts distinguishable from those in *Jensen*.

Accordingly, we find no constitutional impediment to the concurrent operation of the LHCA and Louisiana Workmen's Compensation Act with respect to injuries sustained on land in the course of new ship construction.

FEDERAL PREEMINENCE IN THE FIELD

Defendants argue that, even if state law may constitutionally apply to workers covered by LHCA, state law must

nevertheless yield to federal preemption of the field. It is well settled, however, that the mere fact that Congress enacts a law in a given area does not thereby exclude the power of a state to apply its laws governing the same subject matter. In fact, where Congress legislates in a field traditionally occupied by state law, it is assumed that the historic police powers of the state were not to be superseded by federal act unless that was the clear and manifest purpose of Congress. Rice v. Santa Fe Elevator Corporation, 331 U.S. 218 (1947). In Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), the Court made the following observations concerning federal preemption:

> . . . The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.
>
> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulator, power in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. . . .

As stated in Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973):

> Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law.

The general rule to be derived from these cases and others dealing with the question of federal preemption is that state power is not preempted unless: (1) it was the clear and manifest purpose of Congress to do so, or (2) the exercise of dual authority is repugnant to the Congressional objective.

The disputed LHCA amendments make no express declaration that Congress has preempted the right of states to compensate those land-based longshoremen and harbor workers to whom federal benefits were extended. In fact, there has been no change whatsoever in the coverage provisions of the act itself warranting the conclusion that the LHCA is any more exclusive now than it was prior to 1972 when, as we have already observed, state and federal compensation laws operated concurrently as to many injuries. In fact, the troublesome clause which suggested that the state and federal systems were exclusive, "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law," was deleted in the 1972 revision of the act. This change prompted the following academic commentary:

> Its deletion leaves the statute blank on the relationship of the expanded federal system to the state system. A vague idea of 'federal preeemption' should not lead us to the unfortunate and unnecessary conclusion that the state statuates can now operate only up to (and never beyond) the newly demarcated federal line.

G. Gilmore & C. Black Law of Admiralty 425-26 (2nd ed. 1975). Nor can we find a clear manifestation of congressional intent to preempt state law in the legislative history

of the 1972 amendments. With regard to the landward extension of LHCA, the Congressional committee which studied the amendments made the following comments:

> The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. The following are the maximum limits on the compensation payable for permanent total disability in some maritime States:

California	$70.00
Florida	56.00
Hawaii	112.50
Louisiana	49.00
Maryland	85.68
Massachusetts	77.00
New Jersey	101.00

New York	80.00
Oregon	62.50
Pennsylvania	60.00
Texas	49.00

[1] Plus $6 for each dependent.

Also, under the laws of some states due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victims of an injury.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of

the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to *permit* a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a per-

> son who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

U.S.Code Cong. & Admin. News 1972, pp. 4698, 4707. (Emphasis added.)

Our examination of the legislative history leaves us unconvinced that Congress intended to exclude workers injured on land from their remedies under state compensation laws. The intent was clearly to make the liberal benefits provided by the LHCA uniformly *available* to longshoremen and harborworkers regardless of on which side of the water's edge their injuries were sustained. The legislators noted the meager benefits provided by some states and demonstrated a desire to *"permit"* a uniform compensation system to apply to employees who would otherwise be covered by this act for part of their activity.

There is nothing in the legislative history to suggest that Congress intended to overrule the line of cases recognizing a state's concurrent right to provide compensation for injuries sustained in maritime pursuits of local concern even though the worker was covered by the LHCA. It is pertinent to observe that, in discussing its intention to repudiate the judicial extension of the warranty of unseaworthiness to longshoremen in third party suits against a vessel, the congressional committee discussed in detail the Supreme Court decisions it intended to overrule. We are satisfied therefore that neither the history nor the wording of the 1972 amendments manifest a clear purpose to preclude the applicability of state compensation law in the new land areas covered by the federal act.

Defendants further contend that the pervasiveness of the federal compensation system and regulations promulgated thereunder are facts from which a Congressional intention to preempt state law can be implied. It has not been demonstrated, however, that the regulations issued pursuant to the LHCA as amended are any more pervasive than those handed down prior to the 1972 revisions. Moreover, we note that the pervasiveness of federal regulation and superintendence of the field was never a bar to concurrent application of state and federal law to injuries over water in the pre-1972 era. We are not persuaded that arguments grounded in the pervasiveness of federal regulation are any more compelling now that the LHCA has moved inland nor that the operation of the state compensation law would frustrate the purpose or objectives of the federal act. If the concurrent applicability of the two systems as to certain classes of workers injured over water did not present a significant conflict when state law was elected by injured workers, it is difficult to comprehend how the concurrent operation of the compensation systems over land can generate conflicts of a more serious nature. We are in agreement with the appeal court's determination of this issue.

THIRD PARTY ACTIONS AGAINST EXECUTIVE OFFICERS AND FELLOW EMPLOYEES

La. R.S. 23:1101 gives an injured party the right to "obtain damages from or proceed against such [a negligent] third party to recover damages for the injury." Our jurisprudence has interpreted third parties within the contemplation of this statute to include fellow employees and executive officers. Canter v. Koehring Co., 283 So. 2d 716

(La. 1973).[7] Grigg v. Martin, 269 So. 2d 331 (La. App. 2d Cir. 1972); Jolly v. Travelers Ins. Co., 161 So. 2d 354 (La. App. 4th Cir. 1964). Defendants argue that in this respect the Louisiana Workmen's Compensation Act is in direct conflict with the LHCA which provides:

> The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

That the provisions of the state and federal compensation laws with respect to third party negligence actions are different cannot be disputed. We are of the opinion, however, that once the initial determination was made that the LHCA and state compensations statutes could operate concurrently,the appeal court was in error to reexamine the question of state-federal conflict with respect to particular provisions of the acts. It is obvious that unless the state statute provides benefits or rights beyond those accorded by federal law, there would be no reason to elect to pursue the state remedy. To hold, as did the appellate court, that a plaintiff may elect state law but only insofar as the rights accorded thereunder do not exceed those provided in the federal scheme is to render meaningless the right to make the initial election. We find it particularly significant that

7. This interpretation of La. R.S. 23:1101 has now been legislatively overruled to prohibit suits against executive officers and fellow employees. La. Acts 1976, No. 147.

workers who chose to pursue state remedies during the pre-1972 era were allowed to take advantage of the state law in its entirety. The courts did not compare particular provisions of the laws with a view to harmonizing differences.

In sum, it is our opinion that the 1972 amendments to the LHCA were intended to provide additional benefits for land-based maritime workers rather than to deprive them of rights and remedies which they already had. Louisiana has a legitimate interest in assuring the applicability of its compensation laws to injuries sustained within its jurisdiction. Accordingly, there should be no compelling reason to prohibit the legislature of this state from making available what, to some plaintiffs, may be a more attractive compensation scheme, so long as double recovery is not permitted. Until this court is confronted with authority to the contrary, we decline to hold that the compensation law of this state is preempted from operating in an area of traditionally local concern.

Accordingly, we reverse the decision of the appeal court insofar as it held that state law regarding suits against executive officers and fellow servants cannot be availed of by a plaintiff who has elected to proceed under the Louisiana Workmen's Compensation statute. However, we note a distinction in the cases before us for review which the appeal court failed to discern. The widow and children of Curtis Poche, Sr. elected to sue under the state law and declined to accept LHCA benefits when they were offered by Avondale Shipyards. Conversely, it was stipulated at trial that plaintiff Aldrich Adams was receiving compensation payments under the LHCA. We are of the opinion that Adams, having availed himself of the benefits under the LHCA, has elected to pursue his remedies under the federal compen-

sation statute. No argument to the contrary has been made. Since the LHCA prohibits suits against officers and fellow employees, the decision of the appeal court affirming the ruling of the trial judge and dismissing the suit instituted by Adams is correct. Furthermore, we are unable to say that the court of appeal erred in affirming the trial court's ruling which sustained Avondale Shipyards' exception to the *Poche* suit; nor has any error in the court of appeal judgment in this regard been urged before us.

DECREE

For the reasons assigned, the judgment of the court of appeal affirming the trial court's ruling which sustained the exceptions of defendant executive officers and dismissed the suit of Curtis Poche, Jr., et al., against them is reversed and the case is remanded to the trial court for further proceedings not inconsistent with this opinion, with costs assessed to defendants. However, the portion of the judgment of the appeal court affirming the trial court's ruling which sustained the exception of Avondale Shipyards, Inc. and dismissed the suit as to this defendant is affirmed.

For the reasons assigned, the judgment of the court of appeal as to plaintiff Aldrich Adams maintaining the trial court's ruling which sustained defendants' exceptions of no right or cause of action and dismissed the suit against them is affirmed at appellant's cost.

APPENDIX C

REHEARING REFUSED

UNITED STATES OF AMERICA
STATE OF LOUISIANA
SUPREME COURT OF THE STATE OF LOUISIANA

New Orleans, 70112

New Orleans, Friday, December 10, 1976

AT CHAMBERS

REHEARING REFUSED:

57,966 Poche, Jr., et al v. Avondale Shipyards, Inc., et al.
c/w
57,906 Adams v. Hartzman, et al
See Per Curiam attached.

* *

I, Andrew J. Falcon, Deputy Clerk, Supreme Court of Louisiana, do hereby certify the above to be a true and correct extract from the minutes of this Court.

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the Court aforesaid, at the City of New Orleans, this the 7th day of March, A.D., 1977.

s/ Andrew J. Falcon
Deputy Clerk
Supreme Court of Louisiana

(SEAL)

APPENDIX D

PER CURIAM ON REHEARING

SUPREME COURT OF LOUISIANA

NO. 57, 906

ADAMS

v.

HARTZMAN, ET AL.

Dec 10, 1976

PER CURIAM ON REHEARING

Applicant Adams properly points out in his application on rehearing that there is no evidence in the record establishing that he made an election, or a choice of L. H. C. A. remedies, but only evidence that he has accepted benefits under the L.H.C.A. Act.

In light of the following cases: Calbeck v. Travelers Insurance Company, 370 U.S. 116 (1962); Holland v. Harrison Bros. C. Dry Dock and Repair Yard, Inc., 306 F. 2d 369 (5th Cir. 1962); Griffin v. Universal Underwriters Insurance Company, 283 So. 2d 748 (La. 1973); and Ryder v. Insurance Company of North America, 282 So. 2d 771 (La. App. 3d Cir. 1973), we deem it advisable to vacate our original judgment as to plaintiff Adams and to remand the case to the district court for the purpose of trying the issue of whether Adams elected federal benefits.

Furthermore, we reserve to the defendants in the case of Adams v. Hartzman, et al the right to apply for a rehearing on this issue. When final here the case of Adams v. Hartzman, et al will be remanded to the district court for further proceedings in accordance with this per curiam.

In the case of Poche, et al v. Avondale Shipyards, Inc. et al, rehearing is denied.

SUPREME COURT OF LOUISIANA
A TRUE COPY
MAR 7, 1977

s/ Andrew J. Falcon
Deputy Clerk
SEAL

Supreme Court, U. S.
FILED
JUL 22 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1258

PETER TERRITO, et al.,
Appellants

versus

CURTIS POCHE, JR., et al.,
Appellees

ON APPEAL FROM THE SUPREME COURT
STATE OF LOUISIANA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL JURISDICTIONAL STATEMENT and SUPPLEMENTAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76 - 1258

PETER TERRITO, et al.,
Appellants

versus

CURTIS POCHE, JR., et al.,
Appellees

ON APPEAL FROM THE SUPREME COURT
STATE OF LOUISIANA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL JURISDICTIONAL STATEMENT and SUPPLEMENTAL STATEMENT

TO: THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES.

Appellants respectfully move this Court for permission to supplement their jurisdictional statement with the rationale of *Northeast Marine Terminal Co., Inc. vs. Caputo, et al.*, No. 76-444, decided June 17, 1977 and to outline the practical implications to employers and employees in approximately one half of the States if the opinion of the Supreme Court of Louisiana is permitted to become the law

governing state - federal compensation and third party liability schemes.

Respectfully submitted,

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MAY IT PLEASE THE COURT:

In response to the Court's invitation, the Solicitor General filed a memorandum opposing the granting of an appeal in this matter although he concedes that the preemption claim falls within the appellate jurisdiction of the Court (Memorandum, P. 4 Fn. 5) and further concedes that the issues raised by this appeal/application for writ of certiorari are important to approximately one-half of the sovereign States. (P. 10.) The Solicitor also attempted to brief the merits of the case; however the Solicitor failed to consider the practical effects of the rationale espoused by the Louisiana Supreme Court and the effect upon the Longshoremen's Act if the Louisiana opinion is to govern the state-federal, employee-employer relationships on the waterfront.

I. *The Federal Questions Are Substantial*

The Federal questions involved in this appeal concern the effect of a State remedy upon a Federal statute, the interpretation of the 1972 amendments to the Longshore Act and most significantly, the abrogation of clear and unambiguous provisions of the Federal statute with regard to third party tort liability.

The Louisiana Court's decision and rationale would result in the following:

a) An employee, by the election of a state court remedy, will be able to negate the effect of positive law (Section 33 (i)) specifically immunizing fellow employees from tort exposure;

b) The employee will be deprived of the protection and immunity of the Federal statute;

c) The employer may find itself responding in damages for the tortious actions of its employees, a result specifically repudiated by Congress in 1972.

d) The employer may easily find itself, once again, involved in *Ryan* type situations. For example the Longshoreman's Act presently prohibits *Ryan* type indemnity agreements. Louisiana law contains no such prohibition. Under the *Poche* opinion below, a plaintiff, covered by the Longshore Act but injured on land by the actions of a third party who had exacted an indemnity agreement from the employer, will recover in tort from his employer, the very result corrected by Congress in the 1972 amendments. Under the *Poche* opinion, the land based Longshore plaintiff may neutralize the provisions and immunities granted the employer by a simple choice. No such choice might be available to the employee injured upon navigable waters. Can it be seriously contended that Congress intended such "circular liability" situations, situations sought to be remedied by the 1972 amendment? Can it be seriously argued that Congress intended that remedies be available depending upon which side of the water the injury occurred? The Solicitor failed to take into sufficient account the fact that the Congress, by extension of its maritime jurisdiction, *Jacksonville Shipyards, Inc. vs. Perdue*, 539 F. 2d 533 (5th Cir. 1976), cert denied, encompassed a certain class of employees as Longshore employees. When the Congressional Committee reports are read it becomes clear that Congress was not aware that under pre-1972 jurisprudence certain "twilight zone" employees were able to choose their first party remedies. Both Committee Reports state:

> Coverage on the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs. The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered for party of their activity.

The Committees further stated:

> It is apparent that if Federal benefit structure embodied in [the] Committee bill is enacted, there would be a substantial disparity in benefits. . . . *if State laws are permitted to apply to injuries occurring on land.* S. Rep. at 12-13; H.R. Rpt. at 10-11.

Can it be argued that Congress intended to put all employees clearly covered by the Longshore Act under the old "twilight zone"? Contrary to the suggestion in the Solicitor's memo, there is no mention of the *Hahn* decision or, for that matter any of this Court's "twilight zone" decision involving the choice of a first party remedy. All through both Committee Reports are found the words "uniform", "compensation as exclusive remedy" (except as provided by the Act), and the Reports contain extensive discussions concerning the all encompassing nature of the remedies provided by the Act. The *Poche* decision not only creates a new "twilight zone" for a first party compensation situation but also creates a "twilight zone" in the third party liability area, a result certainly not intended by the Congress.

The *McCartin* case cited by the Solicitor (and all cases cited in the memorandum) involve only first party liability and all involve "twilight zone" employees. Even if the Court should adopt the "concurrent jurisdiction" theory set out by the Louisiana court, the Court should still examine carefully the effect of the *Poche* opinion upon the operation of the Federal enactment. Curtis Poche was *not* a twilight zone employee; however, notwithstanding his status with respect to his (or his heirs') first party claim, this Court should not permit the creation of a new "twilight zone" vis a vis third party liability claims, the result that follows from the *Poche* opinion below.

e) The *Poche* opinion establishes an area of concurrent jurisdiction in which, according to the Louisiana court, both federal and state schemes apply. May the employer choose to handle the claim under the state system and thereby ignore the extensive administrative procedures made a part of the Act by the 1972 amendments? Will the determination of available remedies depend upon an "election" as indicated in *Poche* below? If so, what constitutes the election? All of these questions have a substantial impact upon the application of the Act and all remain either unanswered or answered insufficiently by the courts below.

The Solicitor argues that the federal statute leaves room for supplemental state remedies. (Memo, P. 9.) However the state remedy herein *conflicts* with the statute and the clear intent of Congress. This Court has held that even when Congress has not expressly prohibited dual regulation nor unequivocally declared its exclusionary exercise of

authority over a particular subject matter, federal preemption may be implied. *Bethelehem Steel Co. vs New York State Labor Relations Board*, 330 U.S. 767 (1947), *Northern States Power Company vs State of Minnesota*, 447 F.2d 1143, 1146, (1971). This is especially true when the federal statutes and state remedy are so clearly inapposite. In this case, all agree that the state tort remedy is hostile to the federal legislation. The intended uniformity in the operation of the federal law would be destroyed if varied interpretations are given to the application of state remedies and the federal Act by the sovereign States. The decision of the highest Louisiana court effectively destroys the operation of the immunity granted by Section 33(i) of the Act and the decision below sets forth substantial federal questions that must be resolved. Both Avondale and appellants are burdened with additional liabilities, liabilities abrogated by the Longshoremen's Act as amended.

II. *The Poche Opinion Relies Upon An "Election Theory"*

The opinion below turns upon an "election" of remedies theory. Appellants suggest that a plaintiff should not be able to nullify the operation of a federal statutory immunity by his election, especially when third parties are exposed under a state tort remedy. For this reason, this Court should examine the ramifications of that holding.

III. *The Issues of Preemption and Conflict Between the State- Federal Schemes Require Plenary Consideration.*

The Court's jurisprudence in the area of preemption and federal-state conflict requires detailed and careful analysis of the purposes behind the conflicting statutes or remedies.

Such consideration involves an extensive briefing of the issues and the decision must provide guidance to shipyards and waterfront employers throughout the nation. The opinion below has led to much confusion in Louisiana with respect to the operation of the Federal and State compensation remedies.

IV. *Recent Decisions*

The Court's opinion in *Northeast Marine Terminal Co. Inc., et al v. Caputo*, cited *supra* adds credence to appellants' contention that the Act should be interpreted as written. However this court has never passed upon this state-federal issue. The closest fact situation has been encountered in the offshore fixed platform cases wherein the Outer Continental Shelf Land Act, 43 U.S.C. §1331 et seq. provides that the Longshoremen's Act applies to injuries occurring on fixed platforms offshore to the Louisiana coast. *Rodrigue v. Aetna Cas. and Sur Co.*, 395 U.S. 352 (1969) held that such platforms are islands of Federal law but that the law of the adjacent state shall apply in the *absence of a Federal statute. Nations vs. Morris*, 483 F.2d 577 (5 Cir. 1973) held that a Louisiana law permitting suits by and against fellow employees did not apply as surrogate law and that the grant of immunity found in LHWCA precluded the executive officer suit. The Fifth Circuit refused to find a twilight zone where none existed and, indeed, found a conflict between federal and state law so as to preclude the maintenance of the state remedy. Additionally the Fifth Circuit had affirmed a dismissal of a fellow employees suit in *Hughes vs Chitty*, 415 F.2d 1150, affirming 283 F. Supp. 734 (E. D.La.1969).

The Solicitor completely ignores *Pennsylvania R. Co. vs*

vs O'Rourke, 334 US 334 (1953), in which the Court held that the language of the pre-1972 amendments provided the plaintiff railroad brakeman with the Longshore Act as his exclusive remedy because he fell within the coverage of the Act. This might very well be dispositive of the entire concurrent jurisdiction theory.

Interestingly, the theory of concurrent jurisdiction is a concept proposed by Dean Larson in 3 Larson, *Workmen's Compensation*, a theory proposed prior to the adoption of the Longshore amendments in 1972. Although the application of the concept of concurrent jurisdiction to a clearly covered employee is subject to doubt post-1972, it will be assumed for purposes of argument that it still possesses some vitality. A careful scrutiny of Larson's theory reveals that the basis for this idea is *Bethlehem Steel vs Moores*, 335 US 874 (1948), *Baskin vs Industrial Acc. Commn.*, 338 US 854 (1949) and *Richard vs Lake Charles Stevedores*, 95 So. 2d 830 (La. App. 1957). But *Richard* was specifically overruled and *rejected in Ellis vs Travelers Ins. Co.*, 129 So. 2d 729 (La. 1961), by the Fifth Circuit in *Flowers vs Travelers Ins. Co.*, 258 F. 2d 220 (5 Cir. 1958), cert denied and by courts of other jurisdictions. *Gaddies vs Trenton Marine Terminal, Inc.*, 206 A 2d 180 (S. Ct. App. Div. 1965), *Warner vs Travelers Ins. Co.*, 332 S.W. 2d 789 (Tex. Civ. App. 1960). See also: *Mackey vs Standard Stevedoring Co.*, 131 So. 2d 123 (La. App. 1964), *Robinson vs Lykes Bros. S.S. Co.*, 170 So. 2d 243 (La. App. 1964), *Noah vs Liberty Mutual Ins. Co.*, 267 F.2d 218 (5 Cir. 1959) and *Thibodeaux vs J. Ray McDermott & Co.*, 276 F. 2d 42 (5 Cir. 1960). But significantly, in the *Moore* and *Baskin* cases, the Court affirmed per curiam and rendered no opinions. The Court denied certiorari in *Flowers*, cited above, 359 US 956 (1962). Yet more significantly, each

and every case cited by Larson in support of the theory of concurrent jurisdiction involved a "twilight zone" plaintiff. In affirming *Moore*, the Court cited Davis, the "twilight zone" case.

It is clear that the concurrent jurisdiction theory stands on shaky foundation after the 1972 amendments to the Longshore Act. The removal of the employee herein from the twilight zone removes him from the concurrent jurisdiction if the latter remains viable at all. Therefore this Court should reject such a contention.

Finally, the proponents of the concurrent theory in the Federal-state compensation area concern themselves with a new "twilight zone" of uncertainty because, they state, injured workers will have to guess if they are covered by the Longshore Act. But the developments post - 1972 fail to support the concern. First, the Benefits Review Board (established by the 1972 amendments) has construed the coverage of the Act to shoreside employees very liberally and an outer limit to the "adjoining area" test has not been reached. See: *Avvento vs Hellenic Lines*, 1 BRBS 174 (1974). Second, the Deputy Commissioner has required Avondale Shipyards (a self - insured corporation) to provide not only Longshore coverage for all its employees, but to convert all its state compensation cases to Longshore. Record p. 138. Additionally, the U.S. Department of Labor indicated that the Federal law should prevail and that all Avondale Personnel (excluding clerical help) must be included under Longshore. Record at p. 138. The ambiguity which concerns Gilmore & Black and Dean Larson will not come to pass if the courts properly interpret the new Act. Larson himself relates:

> A good argument can be made that if we had the whole job to do over again in proper historical sequence, this might well be the pattern that would emerge. That is, if the Longshoremen's Act had been passed immediately after *Jensen*, there would have been no need to apply and develop the maritime-but-local exception in this context, and no need to write the absence- of-state-power requirement into the act; in short, the act's coverage could have *been made clearly exclusive as to all injuries on navigable waters, and we would have been spared the whole tortured story.* [45 S. Cal. L. Rev. 699, 736 (1972).]

Congress has done that and more - it included a new class of employment into the "maritime employment" definition. The creation of new twilight zones will begin a new tortured story. The Benefits Review Board in *Avvento:*

> Congress thus extended shoreward the reach of the maritime law to the point that it is now intended to cover shore-side injuries *previously covered by state law.* [*Avvento vs Hellenic Lines*, 1 BRBS 174 (1974)].

Deputy Commissioner R. J. Shea, Seventh Compensation District:

> With regard to shipyards, we take the position that every activity in the shipyard that contributes in any way to building, repairing, or breaking a vessel is covered except in the administrative or clerical area.

> Because of the nature of remedial or social legislation the coverage aspect must be given the broadest possible interpretation. The intent of P.L. 92-576 was to extend jurisdiction and not restrict it; to prevent iniquities and not to create them. [Communication from D. Com. Shea, March 19, 1974].

Finally the Solicitor of Labor has stated in a brief filed in a case involving only state versus federal compensation remedies that:

> ..to whatever extent a State law might be necessarily *inconsistent* with the amended Longshoremen's Act, the Constitutional *Supremacy* of the Federal Act would render the State law void even as to matters therefore subject only to the State law. . ., *Bethlehem Steel Corp. vs Davis*, No. 7662, Texas Court of Civil Appeals, citing *Askew vs American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

The prohibition against executive offer suits is clearly in conflict with the Federal act, and, in the covered employee situation, an action based upon the Louisiana executive officer remedy must fall.

In closing, this court must not allow the Louisiana courts to create a new twilight zone but should interpret the Longshore Act as amended along the guidelines set forth above. The congress and the administrators of the Act have indicated the course to be followed to prevent repetition of the pre - 1972 jurisprudence. Common sense also dictates

that the continued application of a conflicting state tort remedy over the Longshore covered employee would bring back the uncertainties of coverage and judicial revision of the Act - the identical situations that resulted in the amendments of 1972.

Appellants suggest that for the foregoing supplemental reasons, probable jurisdiction should be noted or that a writ issue. The issues posed in this case require a fresh approach.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the Jurisdictional Statement was served on Charles Kronlage, 717 St. Charles Ave., New Orleans, 70130 and Mr. Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530 by depositing same in the United States mail box, first class postage prepaid, addressed to counsel of record at their post office addresses.

July 21st, 1977.

DONALD A. HAMMETT

Supreme Court, U. S.
FILED
APR 7 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1258

PETER TERRITO, JOHN CHANTREY, EDWARD A. BLANCHARD, AL BOSSIER, EDWIN HARTZMAN and HENRY R. CARTER,
Appellants

versus

CURTIS POCHE, JR. and VELMA POCHE, widow of Curtis Poche, Sr., Individually and as Administratrix of her Minor Children, Whitney Poche and Patricia Poche,
Appellees

ON APPEAL FROM THE SUPREME COURT
STATE OF LOUISIANA

OPPOSITION TO APPELLANTS' JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1258

PETER TERRITO, JOHN CHANTREY, EDWARD A. BLANCHARD, AL BOSSIER, EDWIN HARTZMAN and HENRY R. CARTER,
Appellants

versus

CURTIS POCHE, JR. and VELMA POCHE, widow of Curtis Poche, Sr., Individually and as Administratrix of her Minor Children, Whitney Poche and Patricia Poche,
Appellees

ON APPEAL FROM THE SUPREME COURT,
STATE OF LOUISIANA

OPPOSITION TO APPELLANTS' JURISDICTIONAL STATEMENT

This is an answer to an appeal from the judgment of the Supreme Court, State of Louisiana, dated December 10, 1976, reversing the Court of Appeal, Fourth Circuit, State of Louisiana.

THE OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is reported at 339 So. 2d 1212 (La. 1976), rehearing denied December 10, 1976. The opinion of the Court of Appeal is reported at 329 So.2d (La. App. 4th Cir. 1976).

JURISDICTION

Appellants' Statement of Jurisdiction infers that the validity or constitutionality of a Federal law [33 U.S.C. 933(i)] was put at issue in the State Court.

It further infers that the Louisiana Supreme Court held that State law superceded Federal law, or that 33 U.S.C. 933(i) was unconstitutional.

In the above particulars, Appellants' Statement of Jurisdiction is inaccurate.

At no time have Appellees challenged the validity and/or constitutionality of 33 U.S.C. 933(i), or, for that matter, any other part of the Longshoremen's and Harbor Workers' Compensation Act ("LHCA"). Nor did the Louisiana Supreme Court hold that Louisiana State law superceded Federal law, or that the Federal law was unconstitutional.

In this case, Appellees have simply sought legal redress for the death of Curtis Poche, Sr. under the laws of the State of Louisiana. Appellants challenged their right to so proceed, taking the position that they were forced to seek their remedies under the Federal laws.

The Supreme Court of Louisiana has held that Appellees may proceed under State law, and that they were not compelled to seek redress under Federal law, although that right had been initially *available to them.*

QUESTIONS PRESENTED

Appellees respectfully urge that the questions presented

are more properly stated as follows:

1. When Congress adopted certain amendments to the Longshoremen's and Harbor Workers' Compensation Act in 1972, and made LHCA benefits available to a new class of land workers, was the application of State compensation laws thereby pre-empted, or did they exist concurrently with the Federal Compensation Act?

2. If concurrent jurisdiction existed, and an injured party or his representative elected to pursue remedies under State compensation laws, could they avail themselves of all remedies granted thereunder, or were they limited to those which did not differ from the remedies found under LHCA?

STATEMENT OF THE CASE

In 1972, Congress amended the Longshoremen's and Harbor Workers' Compensation Act, and extended its benefits to certain classes of workers who performed their duties on land.

Curtis Poche, an employee of Avondale Shipyards, was killed while performing duties admittedly covered by the 1972 amendments. Following his death, his survivors accepted, and Avondale paid, Louisiana State compensation benefits in the amount of Sixty-five Dollars ($65) per week. LHCA benefits would have been approximately three (3) time as much.

This continued for more than one (1) year, at which time Avondale suddenly tendered to decedent's representatives a lump sum, which, when added to the Sixty-five Dollars ($65) per week already paid, would have equalled the higher benefits payable under LHCA. Appellees rejected this tender, and advised Avondale that they elected to pursue State compensation benefits.

One of the remedies afforded under the Louisiana compensation laws was the right to institute a negligence suit against executive officers and employees of decedent's employer.[1] Appellees herein pursued that remedy, which is the present suit under consideration.

Despite that fact that Avondale had initially treated the case as one which could be processed under State compensation laws, the insurer of/and officers and employees named as defendants opposed the right of Appellees to institute such a suit, contending that it was prohibited under the provisions of LHCA.

This was the factual posture under which the issues presented under Appellees "Questions Presented" were brought before the State Court for its determination.

The Supreme Court of Louisiana decided:

1. Congress had not intended by passage of the 1972 amendments to LHCA to pre-empt application of State compensation laws on the new land areas covered thereby;

1. LSA R.S. 23:1101. This action has been eliminated by Act 147 of the 1976 Louisiana Legislature, which amended LSA R.S. 23:1101 and 23:1032, the net result of which is the same prohibition against such suits as is found in U.S.C. 33:933(i).

2. Concurrent jurisdiction existed between the Federal and State compensation laws;

3. An injured party or his representative could elect to pursue remedies found under either of the two laws, but could not receive the benefits of both;

4. Where the injured party or his representative chose to pursue remedies provided under State law, they could pursue *all* remedies thereunder, and not just those which did not differ from remedies under LHCA.

In so deciding, the Louisiana Supreme Court relied entirely of precedents established by *this* Court, particularly the "twilight zone" and "choice of remedies" concepts which emerged from *Davis V. Department of Labor and Industries*, 317 U.S. 249 (1942), and the cases which followed.[2]

It concluded further that suits concerning the type of work and the class of workers under consideration did not fall into that sacrosanct area first defined in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), which could affect the "relationship of vessels, plying the high seas in our navigable waters, or their crews", and consequently, there was no inherent constitutional impediment to concurrent application of State laws.

After concluding that concurrent Federal-State jurisdiction existed as to the new class of land-based workers, the

2. See authorities cited by the Louisiana Supreme Court, quoted at page A-11, of Appellants' Jurisdictional Statement.

Court then went on to decide the effect, if any, of the admitted differences found under the two statutes, particularly as to negligence suits.

The *ratio* of the Court as to this issue was quite simple. The pre-1972 "concurrent jurisdiction" suits allowed workers who chose State remedies to take advantage of State law in its entirety, not only those parts which harmonized with LHCA.

Since the 1972 amendments made no change whatsoever to Section 933(i) of LHCA, the implementation of concurrent jurisdiction should be as it was prior to 1972.

In other words, once the Court determined that the 1972 amendments simply expanded the scope of concurrent jurisdiction to encompass new land areas, the Court saw no reason to impose limitations based on statutory differences which had always existed, where no such limitations had been previously imposed.

The result of the Court's decision is not to impair the validity of 33 U.S.C. 933(i), nor is the effect to have that section declared invalid or unconstitutional. That section, as well as the entire Longshoremen's and Harbor Workers' Compensation Act, is given full force and effect under the factual posture intended, i.e., where an injured worker chooses to avail himself of LHCA benefits. Once this happens, then LHCA benefits provide his exclusive remedy, and he may not, thereafter, file any negligence suit against fellow employees or officers of his employer.

However, when the injured worker chooses to pursue

remedies afforded him under the State laws, and elects *not* to receive benefits under LHCA, he should be bound only by the limitations found under the State laws. His *remedy* is not under LHCA, and consequently, the *exclusions* found thereunder should not apply.

A "Federal question" may have been presented in this matter, in the sense that the Supreme Court of Louisiana examined an amendment to a Federal law, to determine whether it pre-empted an otherwise applicable State law. But the State Court's answer to the question complied totally with the judicial guidelines and *stare decisis* created by this Court, as will be seen by the numerous decisions cited and discussed in the State Supreme Court's decision.

In conclusion, whatever Federal question may have been presented has already been answered by this Court, and there should be no good reason to answer it again by granting the appeal herein sought.

CONCLUSION

For the foregoing reasons, probable jurisdiction should not be noted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the Opposition to Appellants' Jurisdictional Statement was served upon all counsel of record by depositing same in a United States mail box, first class postage prepaid, addressed to counsel of record at their post office addresses.

April 6th, 1977.

CHARLES A. KRONLAGE, JR.

No. 76-1258

Supreme Court, U. S.
FILED
JUL 15 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

PETER TERRITO, ET AL., APPELLANTS

v.

CURTIS POCHE, JR., ET AL.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1258

PETER TERRITO, ET AL., APPELLANTS

v.

CURTIS POCHE, JR., ET AL.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation of May 2, 1977.

STATEMENT

Curtis Poche, Sr., was fatally injured in an accident in the course of his employment in a Louisiana shipyard on August 17, 1973 (J.S. App. A-4). He was injured while working on the hull of a ship that had not yet been launched (*ibid.*).

Avondale Shipyards, Inc., Poche's employer, initially paid workers' compensation death benefits to his survivors at the rate prescribed by the Louisiana Workmen's Compensation Act. Appellees, dissatisfied with these payments, filed a wrongful-death action in state court against Avondale and against appellants, who are executive officers of Avondale. Such tort suits were permitted in Louisiana, where the workers' compensation statute established

an exclusive remedy only against the employer itself. See La. Rev. Stat. Ann. §§ 23-1021 to 23-1351 (West 1964).[1]

Avondale then belatedly reported the injury and death under Section 30 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1439, as amended, 33 U.S.C. 930, and attempted to pay death benefits at the rate required by the federal Act—a rate, in Poche's case, more than twice the amount provided by Louisiana law. Both the report and the payment took place more than a year after the time within which such action is required by the federal Act.[2] Appellees returned Avondale's check for compensation under the federal Act; they maintained that they would pursue only their remedies under Louisiana law (J.S. App. A-23).

In the state court action appellants asserted that the Longshoremen's Act, as amended in 1972, applied to Poche's death, and that Section 33(i) of the federal Act, as amended, 73 Stat. 392, 33 U.S.C. 933(i), immunized them from tort liability. The state court agreed with this argument.[3]

On appeal, appellants added the argument that the Longshoremen's Act preempted the state workers' compensation law in its entirety. The intermediate appellate court rejected this argument, holding that the 1972 amendments to the federal Act had not preempted state legislation and

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[1]The state law has been repealed, and the liability of executives abolished, during the pendency of this litigation. 1976 La. Acts No. 147 (July 16, 1976). Because this is a tort suit for accrued liability, however, the repeal does not affect the proper disposition of the case.

[2]See Sections 14(a), 14(b), and 30(a), 44 Stat. 1432, 1439, as amended, 33 U.S.C. 914(a), 914(b), and 930(a).

[3]The court also dismissed the action against Avondale on state law grounds (see J.S. App. A-24), and that decision is not in issue here.

that within the new coverage of the federal Act the "right to elect to receive benefits under the Louisiana Workmen's Compensation Act remained unaffected" (329 So. 2d 211, 217 (La. Ct. App.)). Nevertheless, the court accepted appellants' argument that Louisiana's "executive liability" action was "expressly prohibited" by Section 33(i) of the federal Act, and that "the option to elect state or federal remedies [does not] exten[d] to third party actions as well as compensation claims" (*id.* at 218). The court therefore affirmed the dismissal of the action.

The Supreme Court of Louisiana reversed (J.S. App. A-3 to A-24; 339 So. 2d 1212). It agreed with the court of appeals that the compensation provisions of the federal Act and of the state statute could apply concurrently (J.S. App. A-9 to A-21). It also concluded, however, that although the provisons of federal and state law regarding negligence actions against persons other than the employer are "different" (*id.* at A-22), the State was entitled to apply its provisions once it had been determined that both bodies of law might apply. Consequently, the court held, appellees' decision to proceed under state law allowed them to sue appellants under state law, without regard to the provisions of federal law.

DISCUSSION

Appellants contend that La. Rev. Stat. Ann. § 23-1101 (West 1964), which before its repeal[4] allowed third-party tort suits to supplement the no-fault workers' compensation remedy in that State, is preempted by federal

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[4]See note 1, *supra*.

law.[5] Although appellants' arguments are not entirely clear, we assume that they seek to present contentions similar to those they pressed below: that the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, entirely preempts all state workers' compensation plans within the extent of federal coverage and that, in any event, Section 33(i) of the federal Act preempts any state provisions permitting tort recovery from third parties (see J.S. App. A-9). We discuss these arguments in turn.

1. This Court has recently considered the effects of the 1972 amendments to the federal statute. *Northeast Marine Terminal Co.* v. *Caputo*, No. 76-444, decided June 17, 1977. In order to provide a uniform compensation system, with increased benefits, for waterfront workers, the 1972 amendments greatly expanded the federal Act's coverage of injuries that occurred on land. Shipbuilders are among the newly-covered workers, and under the federal Act appellees are entitled to federal benefits. See *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533 (C.A. 5), certiorari denied (on this issue) *sub nom. Halter Marine Fabricators, Inc.* v. *Nulty*, June 27, 1977 (No. 76-880); *Dravo Corp.* v. *Maxin*, 545 F. 2d 374 (C.A. 3), certiorari denied, June 27, 1977 (No. 76-1093).

Although the 1972 amendments expand dramatically the scope of the federal statute's coverage, they do not alter the nature of that coverage within the new outer bounds.

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[5]This claim of preemption falls within the appellate jurisdiction of this Court under 28 U.S.C. 1257(2). See *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204. Appellants also contend that the decision below is "tantamount to a striking down of 33 U.S.C. §933(i)" (J.S. 6), so as to invoke jurisdiction under 28 U.S.C. 1257(1), but this contention is insubstantial. The state court construed the federal statute not to preempt state law, but such a construction does not "strike down" or "invalidate" any statute.

Section 33(i), upon which appellants apparently rely, predated the 1972 amendments and was not changed by them. Indeed, the only alteration of the basic plan of the statute that might affect its relationship with state compensation programs appears to make coexistence of overlapping remedies more consistent with the statutory text. Prior to 1972, Section 3(a), 44 Stat. 1426, 33 U.S.C. 903(a), provided that compensation would be payable under the federal Act only if the injury occurred on the navigable waters and "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." This appeared to require the courts to make both federal and state coverage exclusive within separate domains; the provision was deleted in 1972.

Even before 1972, however, the federal and state compensation systems overlapped in practice, and this Court upheld that overlap.

The federal statute was passed in 1927, during a time of uncertainty about the constitutionally-permissible extent of the coverage of state workers' compensation laws. The Court had held that States could not provide compensation for certain workers injured on navigable waters, and it had invalidated two attempts by Congress to authorize the States to provide compensation.[6] The statute Congress passed in 1927, however, seemed to be open to as much uncertainty as the constitutional question; every compensation case potentially required an adjudication of the constitutional limits of the States' power, because Section 3(a) said that if the States could "validly" provide compensation, the federal statute did not apply.

The Court resolved some of the ensuing problems by creating, in *Davis* v. *Department of Labor*, 317 U.S. 249, a "twilight zone" in which both federal and state law could

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[6]See *Caputo*, *supra*, slip op. 6-10.

apply. The Court held that the federal statute did not oust state remedies (317 U.S. at 255), and that an employee who obtained compensation under either state or federal law would not have his award upset, except in extraordinary cases, on the argument that the other law might also have been applied. Mr. Justice Frankfurter, concurring (*id.* at 259), pointed out that recovery under either state or federal statute would be permissible. Only Mr. Chief Justice Stone dissented, and his dissent, which would have held that the federal statute was the exclusive remedy within the scope of its operation, simply made it plain that the Court had rejected any notion that state laws were preempted.[7]

The principle of *Davis* was reiterated in *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272, which explicitly held that any worker injured in the "twilight zone" could pursue remedies under either state or federal compensation schemes; the federal statute did not preempt the state statute, and recovery under the state statute was sustained in *Hahn* even though the injury took place on the navigable waters and the employee unquestionably would have been entitled to federal benefits.

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[7]The Court also has held that the coexistence of workers' compensation remedies does not depend, as the Supreme Court of Louisiana apparently concluded in the present case, upon the making of an "election" to seek remedies under one statute or the other. See *Industrial Commission* v. *McCartin*, 330 U.S. 622 (the application of more than one workers' compensation law is permissible so long as the worker obtains only a single recovery measured by the total permitted under the more generous statute). In *McCartin* itself the Court held that a worker could recover full benefits under Illinois law and then obtain additional benefits provided by Wisconsin law. The Full Faith and Credit Clause (which operates, once one State has rendered a judgment, much like the Supremacy Clause upon which appellants rely) was satisified, the Court concluded, by crediting the Illinois recovery against the amounts owing under Wisconsin law. The same reasoning applies to recovery under state and federal law. *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 131-132.

The Court repudiated any lingering doubt that state and federal remedies were mutually exclusive in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, holding (*id.* at 131-132) that a worker could seek and obtain benefits under both state and federal law so long as there was not multiple recovery for the same injury.

Nothing in the legislative history of the 1972 amendments to the federal Act indicates congressional dissatisfaction with these cases, to the extent they allowed workers to pursue state remedies even though a federal remedy also was available. Congress redressed much of the uncertainty in the scope of federal coverage that had caused many workers to seek state remedies, but there is no reason to believe that Congress wanted to prevent the newly-covered workers from pursuing favorable state remedies. There would be no reason to conclude that workers may recover under state law if injured over the water (as in *Hahn*) but not on land (as in the present case); since the federal interest in uniform remedies for injuries is strongest when the injury takes place on the water, the preemptive effect of federal legislation should be less, not more, as applied to injuries on the land.[8]

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[8]Without exception, scholars of the subject have concluded that nothing in the 1972 amendments to the federal statute preempts state workers' compensation statutes. See Gilmore and Black, *The Law of Admiralty* 425-426, 431-434, 924-926 (2d ed. 1975); 4 Larson, *The Law of Workmen's Compensation* §§ 89.52-89.53, 89.70 (1976); Larson, *The Conflicts Problem Between the Longshoremen's Act and State Workmen's Compensation Acts Under the 1972 Amendments*, 14 Houston L. Rev. 287 (1977); Watson, *Broadened Coverage Under the LHWCA*, 33 La. L. Rev. 683, 694-695 (1973). See also Larson, *The Conflict of Laws Problem Between the Longshoremen's Act and State Workmen's Compensation Acts*, 45 So. Cal. L. Rev. 699 (1972).

Remedies overlap in many other areas of the law, too. For example, victims of discrimination in employment may have remedies

2. There remains the possibility that the state remedy should be preempted in this case because it involves a conflict not between federal and state workers' compensation remedies, but between a state statute permitting third-party recoveries against fellow employees and Section 33(i) of the Longshoremen's Act, which forbids such recoveries.

The scant legislative history of Section 33(i) indicates that it was intended to prevent circumvention of the rule that recovery under the Longshoremen's Act would be the sole *federal* remedy for a maritime injury.[9] It supplements Section 5, 33 U.S.C. 905, which abolished the right to full compensatory damages from the employers of covered workers; its primary purpose was to prevent tort actions by longshoremen indirectly against their employers, and it was the first of a series of changes that culminated in the adoption, in 1972, of a ban on successive actions by longshoremen against a vessel, and the vessel against the longshoremen's employers. See Section 5(b), 86 Stat. 1263,

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under private contracts, under state administrative and judicial procedures, federal administrative remedies, and at least two federal statutory remedies. The profusion of remedial devices does not, however, mean that one preempts another or that only one may be used. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36; cf. *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229.

[9]Section 33(i) was enacted in 1959 as part of a complete revision of Section 33 in the wake of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124. See 73 Stat. 392. What little legislative history there is is contained in H.R. Rep. No. 229, 86th Cong., 1st Sess. (1959); S. Rep. No. 428, 86th Cong., 1st Sess. (1959); H.R. Rep. No. 2286, 85th Cong., 2d Sess. (1958); S. Rep. No. 2481, 85th Cong., 2d Sess. (1958); Hearings on Bills Relating to the Longshoremen's and Harbor Workers' Compensation Act before a Special Subcommittee of the House Committee on Education and Labor, 84th Cong., 2d Sess. 16-17, 23-24, 39, 82-83, 84, 91-92, 93, 104, 110, 133 (1956).

33 U.S.C. (Supp. V) 905(b); *Caputo, supra*, slip op. 11-12 n. 18. See also *Reed* v. *The Yaka*, 373 U.S. 410; *Jackson* v. *Lykes Bros. S.S. Co.*, 386 U.S. 731.

Section 33(i) simply does not address the problem of adjusting overlapping remedies under the laws of two sovereigns. It must have been clear when Section 33(i) was added to the Act that *Hahn*, decided only seven months before, had established that federal and state remedies operated concurrently at least within the "twilight zone"—that is, every area in which state law arguably could apply. Nothing in the legislative history of Section 33(i) indicates congressional dissatisfaction with *Hahn*. If there is any doubt about this, it should be resolved, as it has been in the past, by construing the federal statute liberally in favor of injured workers. See *Caputo, supra*, slip op. 17. Workers' compensation statutes are enacted primarily for the benefit of workers and their families, and they "should not readily [be] interpret[ed] * * * so as to cut off an employee's right to sue under other legislation passed for his benefit." *Industrial Commission* v. *McCartin*, 330 U.S. 622, 628. Here, as elsewhere when there is no clear congressional intention to oust state remedies, it is appropriate to construe the federal statute to leave room for the operation of a system of state remedies that supplements the federal remedy. *De Canas* v. *Bica*, 424 U.S. 351.[10]

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[10]*Jones* v. *Rath Packing Co.*, No. 75-1053, decided March 29, 1977, does not look in a contrary direction. The Court concluded in *Jones* that part of California's foodstuff weights and measures system was preempted by federal statutes that required different weights and measures standards. But in *Jones* one of the federal statutes contained an explicit declaration of preemption. Perhaps more important, however, is the fact that in *Jones* the federal and state statutes created different substantive rules concerning the packaging and labeling of foodstuffs; the present case involves only a different approach to the

3. The question presented by this case is important. Now that the federal statute has been extended to cover injuries on land, there will inevitably be a considerable overlap of the federal remedy and the state remedies that traditionally have applied to waterfront injuries. We have been informed by the Department of Labor that almost all States have workers' compensation statutes that might apply to some workers also covered by the federal Act, and that approximately half of the States permit some form of third party liability against other employees of a common employer.[11]

But the creation of a federal remedy for injuries on land does not raise any legal question that this Court has not already faced and resolved; the new provisions of the federal Act no more preempt state remedies for injuries on land than the old provisions preempted state remedies for injuries on the water. There is no indication that a system of overlapping state and federal remedies would hinder the achievement of the purpose of the federal statute, and there is no reason to believe that Congress intended in 1972 to set aside this Court's holdings in *Davis*, *Hahn* and *Calbeck* that such an overlap is consistent with the federal statute. There is accordingly no reason for the Court to grant plenary review in this case.

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question of remedies for the breach of the acknowledged duty to maintain a safe workplace. Appellants and Avondale are not in the untenable position of owing conflicting duties to two sovereigns, and nothing in the state compensation provisions "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Jones*, *supra*, slip op. 5, quoting from *Hines* v. *Davidowitz*, 312 U.S. 52, 67.

[11]The importance of the present case, however, is substantially diminished by the fact that Louisiana has repealed the statute under which appellees brought this suit. See note 1, *supra*.

CONCLUSION

The appeal should be dismissed for want of a substantial federal question.

Respectfully submitted.

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JULY 1977.

DOJ-1977-07